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No. 99-1013

IN THE
# Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, *et al.*,
*Petitioners,*

v.

TAMIAMI PARTNERS, LTD., *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF IN OPPOSITION

JOSEPH M. MATTHEWS
ENID DUANY MENDOZA
COLSON, HICKS, EIDSON,
COLSON & MATTHEWS, P.A.
200 South Biscayne Blvd.
Suite 4700
Miami, FL 33131
(305) 373-5400

* Counsel of Record

JOHN G. ROBERTS, JR.*
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

*Counsel for Respondents*

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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## QUESTIONS PRESENTED

1. Whether certiorari is warranted to review the Eleventh Circuit's determination on an interlocutory appeal that the particular claims in this case, which are dependent on the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, and its implementing regulations, pose a federal question.

2. Whether certiorari is warranted to review the Eleventh Circuit's determination on the particular facts of this case that the petitioner Tribe expressly waived its immunity from actions to enforce the terms of an arbitration agreement to which it was a party.

## RULE 29.6 STATEMENT

Respondent Tamiami Partners, Ltd. ("Tamiami") is a limited partnership. Respondent Tamiami Development Corporation ("Tamiami Development") is the general partner of Tamiami Partners, Ltd. Neither Tamiami nor Tamiami Development has any parent corporations or any wholly or partially owned subsidiaries.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF IN OPPOSITION

Respondents Tamiami Partners, Ltd. and Tamiami Development Corporation respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

## INTRODUCTION

Respondents Tamiami Partners, Ltd. and Tamiami Development Corporation (collectively "Tamiami") entered into an agreement with petitioner Miccosukee Tribe of Indians of Florida under which Tamiami would buy a parcel of land, deed it to the Tribe, and build and operate a bingo facility there, in exchange for a share of the facility's revenues. The parties' management agreement was governed by the Indian Gaming Regulation Act—a federal statute designed to preempt the field of Indian

gaming—and its detailed implementing regulations. *See* 25 U.S.C. §§ 2701 *et seq.* The Act and its regulations also prescribed conditions for issuing gaming licenses, which were necessary for the operation of the bingo facility.

After Tamiami had bought the land, deeded it to the Tribe, and built the facility, the Tribe twice attempted to purchase Tamiami's interest in the operation—first offering less than, and then the same amount as, Tamiami's initial investment. When Tamiami rejected those offers, the Tribe resorted to other measures: it declared Tamiami in breach of the parties' management agreement, denied it the necessary gaming licenses, and evicted it from the facility. Asserting that the Tribe had denied its applications for gaming licenses in bad faith in order to gain control of the bingo facility, Tamiami sued the Tribe in federal court to enforce the terms of the parties' management agreement, which required the parties to arbitrate their claims.

The Eleventh Circuit concluded that Tamiami's claims presented a federal question because they arose under the Indian Gaming Regulatory Act and its implementing regulations, and that under the terms of the management agreement, the Tribe was not immune from suit to compel arbitration or to enforce an arbitration award. Petitioners now seek a writ of certiorari.

This case meets none of the criteria warranting certiorari. *See* S. Ct. Rule 10. This Court disfavors petitions for certiorari arising—like this one—from decisions in an interlocutory posture. There is no conflict among the circuits on the issues presented in the petition. *See id.* Nor has the Eleventh Circuit decided an "important question of federal law" in a way that "conflicts with relevant decisions of this Court." *Id.* To the contrary: the first

question presented was already decided *in petitioners' favor* in an earlier appeal and comports with this Court's precedents, and the second question presented merely challenges the application of settled Supreme Court precedent to the specific facts of this case.

In short, petitioners have asked this Court to issue a writ to review an interlocutory decision with which no other court of appeals disagrees, when the first question petitioners present was already decided in their favor in an earlier appeal, and the second is intensely fact-bound. The petition should be denied.

## COUNTERSTATEMENT

### A. Statutory and Regulatory Background.

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*, regulates gaming operations on Indian lands. The Act declares that "the establishment of independent Federal regulatory authority for gaming on Indian lands [and] the establishment of Federal standards for gaming on Indian lands * * * are necessary to meet Congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(1), (3).

In keeping with Congress's intent to provide federal "standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. § 2701(3), IGRA is a comprehensive statute, designed to "expressly preempt the field" of law governing Indian gaming. S. Rep. No. 446 at 6 (1988); *see also Gaming Corp. of Am.* v. *Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996) (IGRA completely preempts the field of Indian gaming); *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1033 (11th Cir. 1995) ("*Tamiami II*") (IGRA "provide[s] for extensive federal oversight of all but the most rudimentary forms of Indian gaming").

The Act regulates two types of gaming activities. "Class II" gaming—the type involved in this case—includes games of chance, such as bingo and the like. *See* 25 U.S.C. § 2703(7).[1] The National Indian Gaming Commission, an entity created by IGRA, monitors Class II gaming conducted on Indian lands "on a continuing basis." *Id.* § 2706(b)(1); *see id.* § 2704 (establishing Commission and enumerating its powers). Before a Tribe contracts with a gaming operator to manage a Class II gaming facility, the Tribe must submit the contract to the Chairman of the Gaming Commission for approval. *Id.* § 2705(a)(4). The Act conditions approval of Class II management contracts on satisfaction of a number of detailed prerequisites. *Id.* § 2711.[2]

The Act also governs a Tribe's licensing of a Class II management contractor and its employees. Section 2710 requires that a Tribe conduct background investigations of the "primary management officials and key employees of the gaming enterprise" and maintain ongoing oversight of those officials and employees. *Id.* § 2710(b)(2)(F)(i). Tribes are required to institute procedures for licensing managers and key employees, and to notify the Commission of the results of all background investigations before issuing gaming licenses. *Id.* § 2710(b)(2)(F)(ii).

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[1] "Class I" gaming encompasses "social games solely for prizes of minimal value or traditional forms of Indian gaming." 25 U.S.C. § 2703(6). IGRA does not regulate Class I gaming. *See id.* § 2710(a)(1). "Class III" gaming, which is regulated by IGRA, includes all forms of gaming not covered by the first two designations, including slot machines, parimutuel wagering, roulette, and blackjack. *See* 25 C.F.R. § 502.4(a)-(d).

[2] To be approved by the Chairman, a proposed management contract must include provisions for, among other things, "adequate accounting procedures" and "verifiable financial reports," minimum guaranteed payments to the Tribe, and "grounds and mechanisms for terminating [the] contract." *Id.* § 2711(b)(1), (6).

Pursuant to IGRA's mandate, *see* 25 U.S.C. § 2706 (b)(10), the Commission promulgated extensive regulations to implement the Act. *See* 25 C.F.R. §§ 501-577.15. The regulations include detailed specifications governing, among other things, procedures for approval of management contracts for Class II gaming enterprises and for licensing Class II managers and employees. *See* 25 C.F.R. §§ 531, 533, 535, 537, 556, 558.

**B. Factual Background.**

1. *The Lawsuit.* The Miccosukee Tribe of Indians of Florida (the "Tribe") is a federally-recognized Indian tribe. In April 1989, the Tribe entered into a Management Agreement with respondent Tamiami Development Corporation to build and operate a bingo facility. In exchange for a fixed percentage of the facility's revenues, Tamiami Development agreed that it would purchase a parcel of land outside of the Miccosukee reservation, convey the real estate to the United States in trust for the Tribe, and design, construct, and manage the gaming facility.

Article 12 of the Agreement provided that "[a]ll disputes, controversies and/or claims arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration." Pet. App. 4a. Article 23 of the Agreement, entitled "Waiver of Sovereign Immunity," provided:

> The [Tribe] waives its sovereign immunity from suit as expressly provided in this Article. The United States District Court for the Southern District of Florida, shall have jurisdiction over the parties hereto in order to enforce the terms hereof specifically, upon one or both of the following events (i) [the Tribe] fails to participate in an arbitration proceeding invoked as provided in Article 12, or (ii) failure

> by [the Tribe] to abide by the terms of an arbitration award. [*Id.*]

The Tribe submitted the Agreement to the Secretary of the Interior for approval, as IGRA required.[3] Following the Secretary's approval, and pursuant to the Agreement, Tamiami Development purchased a large parcel of land, deeded it to the United States in trust for the Tribe, and built a bingo facility on the land. Tamiami Development invested approximately $6.5 million in the land and its improvements.

The Miccosukee bingo enterprise, called Miccosukee Indian Bingo, began operating in September 1990.[4] In August 1991, again as IGRA required, the Tribe passed an ordinance establishing a Tribal Gaming Agency to oversee the Tribe's gaming enterprises, including Miccosukee Indian Bingo. *See* 25 U.S.C. § 2710(b). The ordinance governed the background investigation, registration, and licensing of the gaming enterprises' managers and employees, and required the Tribal Gaming Agency to notify the National Indian Gaming Commission of the results of each background investigation. Under the Tribal ordinance, the denial of a license application resulted in termination of employment and eviction from the Tribe's gaming facility.

From September 1990—when Miccosukee Indian Bingo opened its doors—through January 1992, the Tribe twice

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[3] The Act required the Secretary or his designee to review and approve management contracts if, as in this case, they were negotiated before the National Indian Gaming Commission was constituted. *See* 25 U.S.C. § 2709.

[4] In January 1990, the parties effected a novation of the Management Agreement, and respondent Tamiami Partners, Ltd. ("Tamiami") was substituted for Tamiami Development. Tamiami Development remained associated with the enterprise as Tamiami's general partner. The novation was approved by the Secretary of the Interior, as required by IGRA.

attempted to buy out Tamiami's interest in the facility. The Tribe's first offer was for two million dollars *less* than Tamiami had invested in the project; the second was for the same amount as Tamiami's investment. Tamiami refused both offers.

In late January 1992, the Tribe notified Tamiami that the Management Agreement would be terminated in thirty days, purportedly because Tamiami had committed various "violations of the letter and spirit of the Agreement." Pet. App. 5a. Invoking Article 12 of the Management Agreement, Tamiami formally requested arbitration of the dispute to determine the validity of the Tribe's notice of termination. The Tribe did not respond to Tamiami's request for arbitration; instead, it filed suit in Miccosukee Tribal Court against Tamiami, seeking, among other things, a declaration that the Management Agreement had been validly terminated and an order directing Tamiami to vacate the premises. *See id.*

The day before the Tribe was to terminate the Management Agreement, Tamiami filed suit against the Tribe in federal district court for the Southern District of Florida. Its original complaint sought a declaratory judgment that the Management Agreement required the parties to settle disputes by arbitration, and an injunction compelling the Tribe to arbitrate the termination dispute and preventing the Tribe from taking control of Miccosukee Indian Bingo pending arbitration. *See* Pet. App. 5a-6a. Finding that it had subject matter jurisdiction over the case, the District Court concluded that it would stay the action pending resolution of the Tribe's action in Tribal Court, but that the stay would be lifted if the Tribe attempted to evict or impede Tamiami from operating the bingo facility. Pet. App. 173a-174a.[5]

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[5] The District Court concluded that it had jurisdiction over the case because it presented a "federal common law question" of a

After the District Court stayed Tamiami's suit, the parties proceeded to arbitration, as the Management Agreement provided. An arbitration panel was convened in late 1992. *See* Pet. App. 68a.

In July 1992, several months after the District Court stayed Tamiami's action, the Tribal Gaming Agency denied seventeen gaming license applications filed by Tamiami managers and other key employees. The denial of those applications resulted in each employee's eviction from the Miccosukee Indian Bingo facility. Because the Tribe's denial of seventeen employees' license applications effectively precluded Tamiami from operating Miccosukee Indian Bingo, Tamiami filed a motion in the District Court for injunctive relief to prohibit the Gaming Agency from denying licenses of additional key employees. *See id.* at 145a.

The District Court concluded that the Tribe's licensing process was "arbitrary and capricious," but that IGRA had not provided for contractors such as Tamiami to challenge a tribe's licensing procedures, and that, in any event, the Tribe's waiver of sovereign immunity did not encompass federal suits challenging those licensing procedures. *Id.* at 156a. The court accordingly denied Tamiami's motion for injunctive relief, but retained jurisdiction over the case pending resolution of the Tribal Court action. *Id.* at 163a. Tamiami took an interlocutory appeal from the District Court's order.[6]

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Tribal Court's power over a non-Indian entity. *See* Pet. App. 169a. The Eleventh Circuit ultimately concluded in *Tamiami II* that that was not a proper basis for subject-matter jurisdiction in Tamiami's action. *See* Pet. App. 66a n.38.

[6] Tamiami also appealed the District Court's denial of its motion to file a supplemental complaint. As the Eleventh Circuit later recognized, the Court of Appeals lacked jurisdiction over that appeal and thus had no jurisdiction to consider the allegations in

While Tamiami's interlocutory appeal was pending in the Eleventh Circuit, the Tribe again resorted to self-help to take over the Miccosukee Indian Bingo facility. In April 1993, the Tribal Gaming Agency denied gaming licenses to Tamiami, Tamiami Development, and two of Tamiami's principal officers, evicted Tamiami from the bingo facility, and issued an order appointing a conservator to take over operations at Miccosukee Indian Bingo. *See id.* at 7a. The Tribal Court "ratified" the Tribal Gaming Agency's order the day it issued. *Id.* The newly-appointed conservator began withholding Tamiami's share of revenues from operation of Miccosukee Indian Bingo. *Id.*

Tamiami again sought emergency relief in the District Court. *Id.* at 134a. Concluding that the Tribal Court had overstepped its bounds in "ratifying" the appointment of a conservator, the District Court held that the Tribal Court's order was null and void. The court also held that the Gaming Agency had exceeded its authority in denying Tamiami's license applications, and it ordered the parties to return to the status quo that existed before the Tribe denied the licenses and appointed a conservator. *Id.* at 134a-135a. The Tribe appealed the District Court's ruling. Its appeal was consolidated with Tamiami's.

2. *Tamiami I.* The Eleventh Circuit concluded that Tamiami's complaint did not state a federal question. Pet. App. 128a, 139a-140a ("*Tamiami I*"). Under the "well-pleaded complaint rule," the Court of Appeals explained, federal question jurisdiction " 'exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.' " *Id.* at 137a (quoting *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987)). The court concluded that Tamiami's complaint—which

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Tamiami's supplemental complaint at that stage. *See* Pet. App. 73a n.44.

sought an order compelling the Tribe to arbitrate the termination dispute and preventing it from taking control of the bingo facility—invoked jurisdiction under 28 U.S.C. § 1331, the federal question statute, but presented only allegations establishing a breach of contract claim, and thus did not "arise under" federal law. Pet. App. 137a-138a.

The Eleventh Circuit observed, however, that—following the filing of Tamiami's complaint—"events had occurred and evidence was in the record that suggested a basis for district court jurisdiction." *Id.* at 141a. The court accordingly remanded the case to the District Court with directions to dismiss the action if, after thirty days, neither party had filed a complaint properly alleging federal jurisdiction. *Id.* at 141a-142a.

3. *The Amended Complaint.* On remand—and as the Court of Appeals had directed in *Tamiami I*—Tamiami filed an amended complaint. *See* Pet. App. 107a. The amended complaint, which was brought against the Tribe and several individual members of the Tribe's Business Council and Gaming Agency, stated three basic claims. First, Tamiami alleged that the Tribe had breached the Management Agreement by evicting Tamiami from Miccosukee Indian Bingo and taking control of the enterprise. *See id.* at 81a.[7] The amended complaint's second and third claims were brought directly under IGRA: the second alleged that the Tribe had abused its licensing authority under the statute by refusing to license Tamiami and its two high-ranking officers, and the third stated claims under IGRA against the individual defendants. *Id.* at 81a-82a.

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[7] The Complaint also stated claims against the Tribal Gaming Agency and the Tribal Business Council as agencies of the Tribe.

4. *The Arbitration Award.* Tamiami filed its amended complaint in September 1993, shortly before the arbitration panel—which had convened nearly a year earlier, *see supra* at 8—was to hold its final hearing. *See* Pet. App. 75a. One day after Tamiami filed the amended complaint, the Tribe filed a motion in Tribal Court to stay the arbitration proceedings, and the Tribal Court granted the motion. *Id.* at 75a-76a. Concluding, however, that it derived its authority from the Management Agreement, not from the Tribal Court, the arbitration panel held a final hearing in which the Tribe's arbitrator chose not to participate. *Id.* at 76a.

In October 1993, a majority of the arbitration panel issued a decision against the Tribe, rejecting its contentions that Tamiami had breached the Management Agreement and concluding that the Tribe had violated the Agreement by terminating the Program Director of Miccosukee Indian Bingo after denying his gaming license application. *Id.* The arbitration panel gave the Tribe a choice: it could reinstate Tamiami's Program Director as manager of Miccosukee Indian Bingo, or it could pay Tamiami $9.5 million. *Id.*[8]

5. *The Second Motion to Dismiss.* The Tribe refused to recognize the arbitrators' decision and award. Instead, a few days after the arbitrators issued their decision, the Tribe again restructured management of Miccosukee Indian Bingo. *See id.* at 11a.[9] In addition, back in District

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[8] Petitioners' characterization of the arbitration award—that the arbitrators found "in favor of [Tamiami] on one claim only, which directed reinstatement of one employee," Pet. 9—is, to say the least, disingenuous.

[9] At the Tribe's direction, the facility's conservator withdrew over $1.5 million from the trust account into which Tamiami's share of revenues had been paid, in the form of a cashier's check made out to the Tribe's counsel, Dexter Lehtinen. *Id.* Lehtinen,

Court, the Tribe and the individual defendants moved to dismiss Tamiami's amended complaint, again claiming lack of jurisdiction and sovereign immunity. *See id.* at 11a-12a. The District Court granted the Tribe's motion to dismiss, finding Tamiami's action barred on sovereign immunity grounds. *Id.* at 95a, 122a. The court concluded, however, that the individual defendants were not entitled to claim immunity from suit and denied their motion to dismiss. *Id.* at 124a. Tamiami appealed the District Court's dismissal of its claims against the Tribe, and the individual defendants appealed the District Court's order refusing to dismiss the claims against them.

6. *Tamiami II.* In a comprehensive and meticulous opinion, the Eleventh Circuit affirmed the District Court in part and reversed in part. Pet. App. 38a-94a ("*Tamiami II*"). The Court of Appeals first addressed whether the District Court had subject matter jurisdiction over the claims in Tamiami's amended complaint. It held that the District Court had properly exercised jurisdiction because each of Tamiami's claims "ar[ose] under the * * * laws * * * of the United States." 28 U.S.C. § 1331; Pet. App. 83a-84a. The Eleventh Circuit concluded that Tamiami's first claim—that the Tribe had breached its Management Agreement—presented a federal question because "[t]he Agreement incorporates—by operation of law if not by reference—the provisions of IGRA and the [Gaming Commission's] regulations that govern [Miccosukee Indian Bingo's] operations," including those relating to licensing of Tamiami's managers and employees. *Id.* at 83a. Tamiami had alleged in its first claim that when the Tribe denied licenses to Tamiami employees, the Tribe breached its obligation under IGRA

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in turn, endorsed the check over to the Tribe for deposit in a bank account. *Id.* On learning of the Tribe's latest evasive maneuvers, the District Court issued an order freezing that account. *Id.*

to process license applications in good faith. That claim, the Eleventh Circuit concluded, was one "arising under federal law: hence the district court had subject matter jurisdiction over Tamiami's breach of contract claim against the Tribe." *Id.* at 84a. The Court of Appeals also held that the District Court had subject matter jurisdiction over Tamiami's second and third claims, which were based directly on IGRA and its implementing regulations. *Id.* at 84a-85a.

Having found that the District Court properly exercised jurisdiction over Tamiami's claims, the Eleventh Circuit then examined whether the District Court had properly dismissed them. The Eleventh Circuit agreed with the lower court that sovereign immunity barred Tamiami's breach-of-contract claim against the Tribe; although the Tribe had expressly waived its immunity from suits to enforce the parties' arbitration agreement, its waiver did not embrace a contract claim requesting money damages and injunctive relief. *Id.* at 87a-88a. The Court of Appeals noted, however, that Tamiami's Amended Complaint did not seek an order compelling the Tribe to submit to arbitration, as had the original complaint.[10] Thus, Tamiami "*remain[ed] free, of course, to seek enforcement in the district court of the October 6, 1993 arbitration award and to seek an order in the district court compelling arbitration* of any remaining contract disputes." *Id.* at 88a n.66 (emphasis added).

The Eleventh Circuit next concluded that Tamiami's second claim against the Tribe, brought directly under IGRA and its implementing regulations, was properly dismissed—not because the Tribe was immune from suit,

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[10] Tamiami had not included a claim to compel arbitration in its Amended Complaint because at the time the Amended Complaint was filed, the parties *were* in arbitration. *See supra* at 8, 11.

but because *IGRA provided no private right of action* against the Tribe for violation of the Act's provisions. *Id.* at 88a. That result, the Court of Appeals observed, "should come as no surprise; as the Supreme Court has observed, 'the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.' " *Id.* (quoting *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979)). Nothing in IGRA or its regulations created, either expressly or impliedly, a cause of action on behalf of a management contractor for a Tribe's violation of the Act's provisions. Thus, the Eleventh Circuit "decline[d] Tamiami's invitation to read into IGRA the right of action Tamiami asserts as its second claim." Pet. App. at 90a.

The Court of Appeals affirmed the District Court's conclusion that the individual defendants were not entitled to immunity from suit, leaving for the District Court the question whether, just as IGRA provided no private right of action against the Tribe, Tamiami was barred from stating claims under IGRA against the individual defendants. *Id.* at 94a.

7. *The Second Amended Complaint.* Back in the District Court for a third time—and again at the Eleventh Circuit's direction, *see* Pet. App. 88a n.66—Tamiami filed a Second Amended Complaint. It stated six claims. The first count requested two types of declaratory relief: "(a) a declaration that all disputes between Tamiami and the Tribe that arise out of or relate to the Agreement —including the licensing dispute—are arbitrable; and (b) a declaration against all of the defendants that the funds in the frozen account belong solely to Tamiami." Pet. App. 15a. The complaint's second and third counts requested judgments compelling the Tribe to comply with

the October 1993 arbitration award and to arbitrate other disputes related to the Agreement. *Id.*[11]

Defendants moved to dismiss Tamiami's Second Amended Complaint on three grounds: sovereign immunity; lack of subject matter jurisdiction; and failure to state a claim. The District Court denied the motions. Pet. App. 36a-37a. Taking as its "guidepost" the Eleventh Circuit's observation in *Tamiami II* that Tamiami "remain[ed] free * * * to seek enforcement in the district court" of the arbitration award or to compel further arbitration of the parties' disputes, the court held that the first three counts of the complaint stated a federal question. *Id.* at 33a, 35a. The District Court exercised supplemental jurisdiction over Counts Four through Six of the complaint, concluding that the individual defendants were not protected by sovereign immunity. *Id.* at 36a. All defendants took interlocutory appeals to the Eleventh Circuit following the District Court's ruling.

8. *Tamiami III.* In June 1999, the Eleventh Circuit issued its third (and thus far, final) decision. Pet. App. 1a ("*Tamiami III*"). It began by defining the scope of its review on defendants' interlocutory appeal. Defendants' jurisdictional and immunity arguments were properly raised on interlocutory appeal, the court concluded; their argument that Tamiami's complaint failed to state a claim was not. *Id.* at 17a-19a. The Court of Appeals accordingly declined to address defendants' Rule 12(b)(6) arguments, limiting its consideration to "whether the district

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[11] The complaint's fourth count sought an injunction directing individual members of the Tribe's Business Council to rescind orders stripping Tamiami of its share of revenues and to pay Tamiami its share of past revenues. Count Five stated a conversion claim against the Chairman of the Tribe and its counsel, Dexter Lehtinen, and Count Six sought an accounting and imposition of a constructive trust. *See* Pet. App. 15a-16a; *see also supra* n.9.

court had subject matter jurisdiction and whether the Tribe and the individual defendants were shielded by sovereign immunity." *Id.* at 19a-20a.

Next, the Court of Appeals rejected the Tribe's argument that Counts One through Three of Tamiami's complaint—those invoking the arbitration clause of the Management Agreement—did not state a federal question:

> [W]e find that the first three counts of Tamiami's complaint present more than a mere dispute concerning a contract or an agreement to arbitrate. Each of these counts—at least in part—concerns the arbitration of Tamiami's claims that the Tribe had an obligation under the Agreement to process the gaming license applications of Tamiami and its key employees in good faith, and that the Tribe breached its obligations when it rejected these license applications for the sole purpose of taking over [Miccosukee Indian Bingo]. [Pet. App. 21a.]

The *Tamiami III* court recognized that Tamiami had presented the same claims in its first Amended Complaint, "albeit in the context of a direct breach of contract suit against the Tribe" rather than a request to compel arbitration, and that the *Tamiami II* panel had concluded those claims presented a federal question "because the Agreement incorporated—by operation of law if not by reference—the provisions of IGRA and its associated regulations regarding licensing procedures." Pet. App. 21a-22a (citing *Tamiami II*, 63 F.3d at 1047). Finding federal law "equally implicated when these claims are presented in the arbitration context" rather than as part of a contract claim for damages, the *Tamiami III* court held that it was required to "follow the *Tamiami* II panel's conclusion here." *Id.* at 22a.

The Eleventh Circuit also rejected the Tribe's alternative contention that Counts One(a), Two, and Three of

the complaint were barred on sovereign immunity grounds, finding that on the particular facts of this case the Tribe had expressly waived its immunity from suits to compel arbitration or to enforce an arbitration award.[12] *See* Pet. App. 27a ("Plainly, these counts seek the type of relief expressly contemplated by Article 23.").

Finally, the Eleventh Circuit held that Tamiami's claims against the individual defendants—Counts One(b) and Four through Six of its second amended complaint—should have been dismissed on sovereign immunity grounds. Pet. App. 28a-29a. Accordingly, following the Eleventh Circuit's decision, only Counts One(a), Two, and Three of Tamiami's second amended complaint—the claims against the Tribe for enforcement of the arbitration clause, for enforcement of the arbitration panel's award, and for further arbitration of disputes—remain standing.

The Tribe and the individual defendants petitioned for rehearing and rehearing *en banc* of the Eleventh Circuit's decision in *Tamiami III*. The Eleventh Circuit denied the defendants' petitions without dissent. Pet. App. 176a.

## REASONS FOR DENYING THE WRIT

### I. THE FIRST QUESTION PRESENTED WAS DECIDED IN PETITIONERS' FAVOR IN AN EARLIER APPEAL.

Petitioners ask this Court to grant certiorari to determine whether IGRA "provide[s] management contractors with a private cause of action against Indian Tribes," and whether the Eleventh Circuit erred in finding subject mat-

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[12] The Court of Appeals agreed with the Tribe that Counts One(b), Four, and Six, which sought relief against the Tribe apart from the arbitration proceedings, were barred by the Tribe's sovereign immunity. Pet. App. 26a-27a.

ter jurisdiction "when it is clear both on the face of the statute and in the legislative history that no private cause of action exists under IGRA for management contractors[.]" Pet. i. Even if the question presented actually were the basis of the Eleventh Circuit's decision in *Tamiami III*—and it is not—it is not worthy of certiorari.

To begin with, this petition arises from an interlocutory appeal; the Court of Appeals has remanded the case for further proceedings in the District Court. Certiorari is greatly disfavored in these circumstances. *See Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) ("Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *see also Virginia Military Institute* v. *United States*, 508 U.S. 946, 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (Scalia, J., respecting the denial of the petition for writ of certiorari); *Estelle* v. *Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting) (noting Supreme Court's "normal practice of denying interlocutory review").[13] If the District Court on remand dismisses Tamiami's complaint or rules in the Tribe's favor after trial, the question presented will be mooted. This Court should decline to grant certiorari to

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[13] *See also Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application."); *American Constr. Co.* v. *Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384 (1893) ("[T]his court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.")

decide a question which may, given time, resolve itself. *See* Robert L. Stern *et al., Supreme Court Practice* § 4.15, at 196 (7th ed. 1993).

There is another problem with petitioners' brief. The question presented—whether IGRA creates a private right of action—is one that the Eleventh Circuit itself answered in *petitioners'* favor in *Tamiami II*.

Tamiami's amended complaint—the complaint at issue in *Tamiami II*—included a count against the Tribe arising directly under IGRA and its implementing regulations. *See* Pet. App. 84a. The *Tamiami II* court concluded that the IGRA claim failed because IGRA provided Tamiami "no right to relief." *Id.* at 88a. Nothing in the Act's language expressly conferred a right of action on a management contractor to seek relief against a tribe, the Court of Appeals explained; the only express right of action on behalf of management contractors allowed them to seek review of certain National Indian Gaming Commission decisions adversely affecting them. *Id.* at 89a. And nothing in the Act's legislative history implied that a management contractor could state a cause of action against a tribe for violations of the Act, particularly where the Act already provided for certain rights of action: " '[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.' " Pet. App. 90a (quoting *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974)). Accordingly, the *Tamiami II* court "declin[ed] * * * to read into IGRA the right of action Tamiami assert[ed] as its second claim." Pet. App. 90a.

Although they acknowledge this holding earlier in their brief, *see* Pet. 4, petitioners conspicuously ignore *Tamiami II* in their argument, arguing over and over again that IGRA "does not provide a private right of action for a

contractor * * * to sue tribes over licensing disputes." Pet. 12.[14] That is exactly what the Eleventh Circuit held in *Tamiami II*: IGRA does not create a private right of action. *See* Pet. App. 86a ("IGRA provides Tamiami no right of action"). No other court has held to the contrary—and the few that have addressed the issue have followed *Tamiami II* to the letter. *See Hein* v. *Capitan Grande Band of Diegueno Mission Indians*, —— F.3d ——, 2000 WL 130831 (9th Cir. Feb. 7, 2000) (following *Tamiami II* and holding that plaintiff could not bring a direct action under IGRA). Even the district court cases petitioners cite for support recognize the holding of *Tamiami II*, although petitioners do not acknowledge it. *See Jimi Dev. Corp.* v. *Ute Mountain Ute Indian Tribe*, 930 F. Supp. 493, 498 (D. Colo. 1996) (finding no private right of action under IGRA in suit by development company against Indian tribe) (citing *Tamiami II*, 63 F.3d at 1048); *Whiteco Metrocom Div. of Whiteco Indus., Inc.* v. *Yankton Sioux Tribe*, 902 F. Supp. 199, 202 (D.S.D. 1995) ("IGRA does not create a private cause of action for individuals") (citing *Tamiami II*, 63 F.3d at 1049).

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[14] *See also id.* at 13 ("in enacting IGRA, Congress made no provision for suits by management contractors such as *Tamiami* to challenge a Tribe's licensing procedures") (emphasis in original); *id.* at 14 ("There is no congressional intent present in IGRA which would provide a right of action to [Tamiami] over the claims in its Second Amended Complaint, nor is there any language in the legislative history to indicate an implied right of action"); *id.* at 15 ("IGRA does not provide management contractors with a private right of action"); *id.* ("there is no provision in the scheme for a private right of action"); *id.* at 16 ("Clearly, there is no Congressional intent in the statutory language of § 2711, nor in any other provision of IGRA, which demonstrates an intent to provide a private right of action to management contractors"); *id.* at 17 ("the reliance on IGRA fails for lack of a right of action"); *id.* at 18 ("there is no colorable argument of a private right of action").

## II. THE ELEVENTH CIRCUIT CORRECTLY CONCLUDED THAT TAMIAMI'S CLAIMS PRESENTED A FEDERAL QUESTION.

1. The *Tamiami III* court did not depart from *Tamiami II*'s holding that IGRA did not create a private right of action, nor could it under established circuit precedent. *See Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting the "absolute rule that a prior decision of the circuit * * * c[an] not be overruled by a panel but only by the court sitting en banc"). The Eleventh Circuit simply concluded—again in keeping with its earlier decision—that Tamiami's claims against the Tribe presented a sufficiently substantial federal question for the District Court to exercise jurisdiction under 28 U.S.C. § 1331.

As this Court previously has explained, Section 1331 federal question jurisdiction exists when "federal law creates the cause of action" *or* when the plaintiff's claims "depend[] on resolution of a substantial question of federal law." *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1993); *see also City of Chicago* v. *International College of Surgeons*, 522 U.S. 156, 164 (1997) (quoting *Franchise Tax Board*). As this Court wrote in *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921):

> The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction.

*See Columbia Gas Trans. Corp.* v. *Drain*, 191 F.3d 552, 559 (4th Cir. 1999) (federal jurisdiction lies if plaintiff's claims " 'turn[] on some construction of federal law' ")

(quoting *Merrill Dow Pharms. Inc.* v. *Thompson*, 478 U.S. 804, 808 (1986)); *T. B. Harms Co.* v. *Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964) (case "arises under" federal act if "the complaint is for a remedy expressly granted by the Act * * * *or* asserts a claim requiring construction of the Act") (Friendly, J.) (emphasis added), *cert. denied*, 381 U.S. 915 (1965).[15]

The Eleventh Circuit concluded in *Tamiami III*, in keeping with *Franchise Tax Board* and *Smith*, that Tamiami's claims for arbitration presented a federal question because they required the court to interpret IGRA and its detailed regulations governing licensing procedures. To resolve the jurisdictional question, the Court of Appeals looked to its predecessor decision in *Tamiami II*, which held that the breach of contract claim in Tamiami's amended complaint presented a federal question:

> The gravamen of Tamiami's contract claim is that the Tribe, acting through the Gaming Agency, has failed to act in good faith; instead, the Gaming Agency, abusing its licensing authority, has rejected

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[15] A claim grounded on a federal statute which itself confers no direct cause of action may nonetheless present a federal question. *See West 14th Street Commercial Corp.* v. *5 West 14th Owners Corp.*, 815 F.2d 188, 196 (2d Cir.) (although federal statute conferred no private right of action, federal element in claim was "still * * * sufficiently substantial to confer [§ 1331] jurisdiction"), *cert. denied*, 484 U.S. 850 (1987); *Platzer* v. *Sloan-Kettering Inst. for Cancer Research*, 787 F. Supp. 360, 366-367 (S.D.N.Y.) (finding subject-matter jurisdiction over breach-of-contract claim requiring interpretation of federal statute: "even where no private right of action exists for the underlying federal issue, if the nature of the federal issue is sufficiently substantial, subject matter jurisdiction may still exist"), *aff'd*, 983 F.2d 1086 (Fed. Cir. 1992), *cert. denied*, 507 U.S. 1006 (1993); *see also Milan Express Co.* v. *Western Surety Co.*, 886 F.2d 783, 786-787 (6th Cir. 1989) (claim "ar[o]se[] under an act of Congress regulating commerce" and created jurisdiction under 28 U.S.C. § 1337(a), although act created no private right of action).

> these applications for the sole purpose of taking over the gaming facility. Tamiami's claims that the Tribe has an obligation under IGRA and the [Gaming Commission's] regulations—which the Agreement incorporates—to process an application for a license in good faith and that the Tribe has breached that obligation are claims arising under federal law; hence the district court had subject matter jurisdiction over Tamiami's breach of contract claim against the Tribe. [Pet. App. 84a.]

The *Tamiami II* court went on to hold that while the breach of contract claim presented a federal question, the Tribe was immune from suit for breach of contract, because its waiver of immunity did not extend to such claims. *Id.* at 88a (Tamiami was not "seek[ing] arbitration of the dispute at hand or the enforcement of an arbitration award").

*Tamiami III* took up where *Tamiami II* left off. Counts One(a), Two, and Three of Tamiami's second amended complaint stated claims for enforcement of the arbitration agreement and the panel's October 1993 award. Tamiami's claims for arbitration were based on (among other things) the Tribe's failure to process Tamiami's licensing applications in good faith and its abuse of the IGRA licensing process in order to seize control of Miccosukee Indian Bingo. *See id.* at 21a. The *Tamiami III* court acknowledged that "the mere fact that a dispute concerns a contract or an agreement to arbitrate, without more, does not raise a federal question." *Id.* at 20a (citing *Tamiami I*, 999 F.2d 503, 507 (11th Cir. 1993)). But the court concluded that Counts One(a), Two, and Three "present[ed] more than a mere dispute concerning a contract or an agreement to arbitrate." Pet. App. 21a. They concerned the arbitration of Tamiami's claims that the Tribe had abused the IGRA

licensing process in order to seize control of the gaming enterprise—the "very same claims before this court in *Tamiami II*, albeit in the context of a direct breach of contract suit against the Tribe" rather than a suit to compel arbitration. *Id.* at 21a-22a. The *Tamiami II* court had held that those claims presented a federal question, and the *Tamiami III* panel held that federal law was "equally implicated when these claims are presented in the arbitration context." *Id.* at 22a.[16]

Thus, *Tamiami III* did not hold, as petitioners suggest, that IGRA creates a "private right of action" for management contractors to sue tribes. It simply held on the facts of this case that Tamiami's particular claims for arbitration were sufficiently bound up with IGRA and its implementing regulations to present a federal question. *See The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959) (certiorari dismissed as improvidently granted when question presented in petition turned out not to be presented in case).

2. Several other courts of appeal have concluded, like the Eleventh Circuit, that claims requiring interpretation of IGRA and its implementing regulations present a federal question. In *Bruce H. Lien Co.* v. *Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996), for example, a casino management company entered into a management agreement with three Indian tribes; as in this case, the parties to the agreement agreed that disputes relating to the agreement would be subject to arbitration. When a

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[16] Petitioners argue that the claims found to present a federal question in *Tamiami III* were the same as those found *not* to confer subject-matter jurisdiction in *Tamiami I*. *See* Pet. 17. But as the Eleventh Circuit explained in *Tamiami III*, the IGRA licensing dispute providing the basis for federal question jurisdiction did not exist when Tamiami's original complaint was filed. *See* Pet. App. 22a n.12.

dispute arose between the parties and the Tribes refused to submit to arbitration, the management company sued in federal district court to enforce the arbitration clause in the parties' agreement. *Id.* at 1416. Concluding that the Tribes' challenge to the validity of the agreement itself should be presented to the Tribal Court in the first instance, the Eighth Circuit nonetheless affirmed the District Court's conclusion that federal question jurisdiction existed:

> While the issue of the contract's validity does not raise a federal question per se, certainly there are aspects of the dispute which do. Particularly where the entire association between the parties (and their various disputes) arise under IGRA, and where the management agreement at issue, once approved, remains so until disapproved by [the National Indian Gaming Commission]. [*Id.* at 1421.]

*See Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997) ("IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court."); *see also Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050, 1055-56 (9th Cir. 1997) (although "federal courts do not have jurisdiction over run-of-the-mill contract claims brought by Indian tribes," claim based on tribal-state compact, "a creation of federal law" with its scope prescribed by IGRA, presented federal question).

The district courts are also in accord with the Eleventh Circuit's decision. In *Tom's Amusement Co.* v. *Cuthbertson*, 816 F. Supp. 403, 406 (W.D.N.C. 1993), the court found federal question jurisdiction over a contract dispute between a supplier of gaming machines and a management contractor, where the contracts were governed by IGRA: "The interpretation of contractual provisions involving gaming establishments on the Reservation involves fed-

eral question issues pursuant to 28 U.S.C. § 1331." Similarly, in *Abdo* v. *Fort Randall Casino*, 957 F. Supp. 1111 (D.S.D. 1997), a casino management company sued a tribe for breach of the parties' management contract—which, like the Management Agreement in this case, was governed by IGRA. The district court found federal question jurisdiction because the dispute "involve[d] the manager of an IGRA regulated gaming casino" and an Indian tribe. *Id.* at 1114. *See also Diamond Game Enters., Inc.* v. *Reno*, 9 F. Supp. 2d 13, 16 (D.D.C. 1998) (controversy requiring "interpretation and application of the IGRA" presented federal question).[17]

## III. THE ELEVENTH CIRCUIT CORRECTLY CONCLUDED THAT THE TRIBE EXPRESSLY WAIVED ITS IMMUNITY FROM SUITS TO ENFORCE THE ARBITRATION AGREEMENT.

1. Suits against Indian tribes, like those against States, are "barred by sovereign immunity absent a clear waiver * * * or congressional abrogation." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498

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[17] *Accord Calvello* v. *Yankton Sioux Tribe*, 899 F. Supp. 431, 435 (D.S.D. 1995) (finding federal question jurisdiction where parties disputed whether management contract was governed by IGRA); *Willis* v. *Fordice*, 850 F. Supp. 523, 530 (S.D. Miss. 1994) (suit requiring court to "interpret the provisions of the IGRA" presented federal question); *Ross* v. *Flandreau Santee Sioux Tribe*, 809 F. Supp. 738, 741 (D.S.D. 1992) (finding federal question jurisdiction where "primary focus" of litigation "relates to an interpretation of [IGRA]"); *Rita, Inc.* v. *Flandreau Santee Sioux Tribe*, 798 F. Supp. 586, 587-588 (D.S.D. 1992) (finding federal question jurisdiction over contract dispute between casino operator and tribe, because the "action involves construing federal laws and the [management] agreement between the parties"); *cf. Calumet Gaming Group-Kansas, Inc.* v. *Kickapoo Tribe of Kansas*, 987 F. Supp. 1321, 1325 (D. Kan. 1997) (recognizing that "a claim involving federal regulations concerning management contracts under IGRA might raise a federal question") (citing *Tamiami II*, 63 F.3d at 1047).

U.S. 505, 509 (1991); *see also Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978); *Turner* v. *United States*, 248 U.S. 354, 358 (1919). A tribe's waiver of sovereign immunity " 'must be unequivocally expressed.' " *United States* v. *Testan*, 424 U.S. 392, 399 (1976) (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)).

2. Applying this Court's precedents to the facts of the case before it, the Eleventh Circuit concluded—twice—that the Tribe had expressly waived its immunity from suits to compel arbitration or to enforce an arbitration award. In *Tamiami II*, the Eleventh Circuit observed that Article 12 of the parties' Management Agreement provided that disputes relating to the Agreement " 'shall be settled by arbitration,' " Pet. App. 87a (quoting Article 12 of Management Agreement), and that the limited waiver of immunity in Article 23 of the Agreement provided means to enforce that arbitration clause. *Id.; see also id.* at 59a (quoting Article 23 of Management Agreement). The *Tamiami II* court concluded that Tamiami's breach-of-contract claim fell outside the scope of the Tribe's express waiver, but noted that Tamiami remained free to "seek enforcement in the district court of the October 6, 1993 arbitration award and to seek an order in the district court compelling arbitration." *Id.* at 88a n.66. Tamiami did just that on remand. *See id.* at 27a.

In *Tamiami III*, the Court of Appeals again examined whether sovereign immunity barred Tamiami's claims against the Tribe. Some claims *were* barred, the court concluded: Counts One(b), Four, and Six, which sought relief against the Tribe outside the scope of its waiver, could not be pursued. But Counts One(a), Two, and Three were not: "Plainly, these counts seek the type of relief expressly contemplated by Article 23." *Id.* at 27a. Thus, applying the proper standard set forth in *Oklahoma Tax*

*Commission* and *Santa Clara Pueblo*, the Court of Appeals examined whether the Tribe had expressly waived its immunity from claims to enforce the parties' agreement to arbitrate on the particular facts of this case, and concluded that it had.

3. Petitioners now ask this Court to grant certiorari to review the Eleventh Circuit's decision, arguing that the decision was "incorrect." Pet. 20. But the Court of Appeals properly applied this Court's precedents to the facts, and certiorari is not warranted to review that decision.

Petitioners concede that Article 23 of the Agreement expressly waived immunity from suits to compel arbitration or to enforce the terms of an arbitration award. *Id.* at 21. They argue, however, that the Eleventh Circuit "incorrectly conclude[d] that the Tribe waived sovereign immunity for all claims related to IGRA's licensing authority." *Id.* That is not what the Eleventh Circuit held at all. It simply examined Article 23's limited waiver of immunity, concluded that some of Tamiami's claims fell outside the scope of that waiver and were barred, and concluded that others were "[p]lainly" within the scope of the waiver. *See* Pet. App. 27a.[18]

This Court's rules warn that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 10. *See United*

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[18] Petitioners suggest that the Eleventh Circuit concluded that the Tribe's waiver of sovereign immunity was "a waiver for 'IGRA claims,' " purporting to quote—but not to cite—the Eleventh Circuit's decision in *Tamiami III*. Pet. 22. The Court of Appeals *never* stated that Article 23 waived immunity from "IGRA claims." *Compare* Pet. App. 25a-27a (discussing Tribe's sovereign immunity and scope of waiver); *see also* Pet. App. 86a-88a (discussing sovereign immunity in *Tamiami II*). Petitioners' purported quotation of that phrase blatantly mischaracterizes the Eleventh Circuit's decision.

*States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("[w]e do not grant a certiorari to review evidence and discuss specific facts"). Petitioners' lament in this case is not with the Eleventh Circuit's standard for finding waiver of tribal immunity, but with the application of that undisputed standard to the particular facts. Petitioners are wrong, but in any event this fact-intensive claim does not present a certworthy question.

## CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

JOSEPH M. MATTHEWS
ENID DUANY MENDOZA
COLSON, HICKS, EIDSON,
COLSON & MATTHEWS, P.A.
200 South Biscayne Blvd.
Suite 4700
Miami, FL 33131
(305) 373-5400
* Counsel of Record

JOHN G. ROBERTS, JR.*
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

*Counsel for Respondents*